

***United States Court of Appeals  
for the Second Circuit***



**PETITION FOR  
REHEARING**



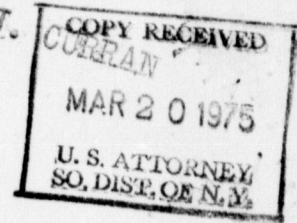
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IN THE  
UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT

PAUL J.



NO. 74-1550

THE UNITED STATES OF AMERICA,  
Plaintiff-Appellee,  
-against-  
CARMINE TRAMUNTI, et al.,  
Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF NEW YORK

DEFENDANT-APPELLANT ANGELO MAMONE'S  
PETITION FOR REHEARING

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UNITED STATES COURT OF APPEALS  
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THE UNITED STATES OF AMERICA,

No. 74-1550

Plaintiff-Appellee,

-against-

CARMINE TRAMUNTI, et al.,

Defendants-Appellants.

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DEFENDANT-APPELLANT ANGELO  
MAMONE'S PETITION FOR REHEARING

Defendant-appellant Angelo Mamone respectfully petitions this Court pursuant to Rule 40, Federal Rules of Appellate Procedure for rehearing of its decision entered on March 7, 1975, which affirmed Mamone's conviction for conspiracy to violate the federal narcotics laws.

THE ISSUES PRESENTED

It is respectfully submitted that the Court overlooked or misapprehended material points of law or fact pertaining to:

a) The inability of Mamone to assert a defense because of the inadequacy of the pretrial notice of the specific charge against him;

b) The illegality of Mamone's sentence;  
and

c) The total absence of evidence in the record that Mamone ever supplied or possessed narcotics.\*

A. The Sufficiency of the Government's  
Pretrial Disclosure

Mamone's contentions with respect to the sufficiency of the pretrial disclosure are discussed at pp. 2151-3 of the opinion. The Court, acknowledging that "neither the indictment nor the bill of particulars...developed in great detail the nature of Mamone's participation in the conspiracy"

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\* In Footnote 22 of the opinion it is noted that:

"Barnaba made sales to Burke with drugs supplied both by Inglese and by Mamone (DiNapoli's partner)."

As will be demonstrated, insofar as reference is made to Mamone, this statement is completely without foundation in the record. Indeed, John Barnaba expressly testified that he never bought or attempted to buy drugs from Mamone and had no knowledge that Mamone ever possessed a narcotic drug or engaged in a narcotics transaction (R. 1639-40).



(Op. p. 2151) and that the bill of particulars was "somewhat limited" (id p. 2153), nevertheless held that the government satisfied minimum notice standards and that Mamone failed to demonstrate prejudice from the absence of fuller disclosure.

It will be recalled that before trial, Mamone was apprised only that the government alleged that he entered the conspiracy in November, 1970, when he went to the Beach Rose Social Club and assisted Inglese in counting the proceeds of a narcotics transaction, an incident which the government later conceded was insufficient to establish Mamone's participation in the conspiracy. The substance of the government's case; viz, the alleged partnership with defendant DiNapoli, the alleged vouching for Forbrick's reliability and the "settlement" of the Burke-Barnaba dispute did not come to light until John Barnaba actually testified.

The Court held that Mamone did not demonstrate that further disclosure would have been helpful because the individuals involved were either dead (Burke), incapacitated (Forbrick) or a fugative (DiLacio).

It is submitted that in this respect the Court misapprehended Mamone's contention. If Barnaba's testimony concerning the involvement of Burke, Forbrick and DiLacio is true, it is highly unlikely that they could have been compelled to testify for Mamone in any event. However, if such persons were available at the time of trial, Mamone may have developed useful evidentiary leads by interviewing them even if they did not testify on his behalf. But the unavailability, even to be interviewed, of the persons who constituted Mamone's only substantive connection with the conspiracy, made it critical that Mamone be afforded an opportunity to conduct pretrial investigation in Pittsburgh where Burke resided to determine whether he was or could have been in New York at the times claimed by Barnaba, to investigate the extent and duration of Forbrick's incapacity to ascertain whether he could have or did deal with Barnaba as claimed and to attempt to ascertain the basis of DiLacio's ambiguous reference to Mamone as DiNapoli's partner.\*

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\* It will be recalled that Barnaba was completely surprised at the suggestion that Mamone and DiNapoli were partners (1461-2) for all of the evidence indicated that it was DiNapoli and Pugliese who were actually partners.



However, because the pretrial disclosure was limited to the money counting incident, Mamone could not know that the government would seek to establish his connection with the conspiracy through incidents involving the missing persons. Hence, he could not conduct pretrial investigation into the substance of the case against him and was limited to futile attempts to impeach Barnaba, a witness clearly determined to avoid jail at any cost, on the basis of 3500 material furnished at the eleventh hour.

In sustaining the adequacy of the notice afforded Mamone, the Court noted that the indictment followed the language of the conspiracy statute and specified some seventeen overt acts in furtherance of the crime (2152).

We respectfully submit that while an indictment following the language of the statute may provide adequate notice in the case of an ordinary crime such as bank robbery or mail fraud, it falls far short where the crime is as elastic and broad as an alleged conspiracy over a period of years and covering a wide geographic area. In the case of a conspiracy charge limited to the language of the statute, a defendant cannot defend by alibi or other affirmative evidence unless he is also afforded sufficient particulars to place

him in the conspiracy; which, as was implicitly acknowledged by the government, was not the case here (5016). Moreover, the inclusion of seventeen overt acts of others in the indictment provided nothing which could enable Mamone to show his lack of individual culpability.

It is fundamental that the government had to show more than the existence of the conspiracy. It also had to show Mamone's personal guilt thereof beyond a reasonable doubt on the basis of evidence he had a fair opportunity to rebut. It is submitted that in this respect the government failed because Mamone was denied adequate notice of the charges against him.

B. Mamone was Illegally Sentenced

Mamone was sentenced to ten years imprisonment under 21 U.S.C.A. §171 which was superseded by 21 U.S.C.A. §841 on May 1, 1971. Of course, if Mamone's participation in the conspiracy were established before the effective date of the new law, he was sentenced under the proper statute even though he was sentenced after that effective date. Bradley v. United States, 410 U.S. 605.



However, assuming arguendo that Mamone's guilt was established, he should have been sentenced under 21 U.S.C.A. 841 for there was no evidence showing that he entered the conspiracy prior to its effective date. It is submitted that Mamone could not have been convicted under the old law\* because the evidence failed to establish that Mamone had actual or constructive possession of narcotics necessary to support the pre-1971 statutory presumption of knowledge of illegal importation. United States v. Harling, 463 F. 2d 923 (D.C. Cir. 1972).

The only act attributable to Mamone prior to May 1, 1971, was the money counting incident in November, 1970. The government conceded that this incident was insufficient to place him in the conspiracy. Even discounting the government's concession, the money counting incident is legally insufficient to constitute the constructive possession necessary to trigger the old law statutory presumption of illegal importation which arose from constructive or actual possession of illicit drugs because it cannot support the inference that Mamone had the power of disposition over any narcotics. United States v. Steward, 451 F. 2d 1203 (2nd Cir. 1971).\*\* Yet, there was nothing else before May, 1971, to show any participation by Mamone in the conspiracy. Accordingly, the matter should be remanded to the District Court for resentencing under 21 U.S.C.A. 841.

\*The jury found that Mamone's participation bridged the old law and new law periods.

\*\*The record is devoid of evidence that Mamone ever had actual possession of narcotics.

- C. This Court Misapprehended a Material Issue of Fact in Finding that "Barnaba Made Sales to Burke with Drugs Supplied by...Mamone" (N. 22)

The misapprehension that Mamone was a provider of narcotics to Barnaba could very well have led this Court to regard the money counting, Forbrick and Burke incidents in a far more damaging light than would otherwise have been the case if such misapprehension had not occurred.

As the record clearly shows, no witness suggested that Mamone ever supplied or possessed a narcotic drug. None testified that he engaged in a narcotics transaction at any time. The government never argued, claimed or suggested that Mamone supplied drugs to John Barnaba or anyone else.\* And, most important of all, John Barnaba testified that he never bought narcotics from Mamone and never attempted to buy narcotics from Mamone (1639). Indeed, to the best of Barnaba's knowledge Mamone never possessed a narcotic drug nor engaged in a narcotics

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\* It was the government's position throughout that Mamone was in the conspiracy by reason of the services he supplied the conspirators by counting money, settling disputes and vouching. It never said that he, personally, was a source of drugs.



transaction (1639-40). Moreover, Barnaba clearly identified Inglese as the source of the narcotics which he sold to Burke (1421-3).

It is submitted that a misapprehension of the magnitude of whether Mamone was a source of narcotics for Barnaba substantially detracts from the substantiality of the remaining evidence which consists of three widely spaced incidents having little or no bearing on the success, failure or progress of the conspiracy. Certainly if Mamone were in daily attendance at the Beach Rose Social Club as suggested by Stasi, the government should be required to establish more than that he counted money in November, 1970, said that his wife knew Forbrick later that month and that nine months thereafter he intervened in the Barnaba-Burke dispute. At the barest minimum, the government should be required to establish some actual connection with the narcotics dealing involved here.



CONCLUSION

Defendant-appellant Mamone's motion for rehearing should be granted.

Respectfully submitted,

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Appellant Angelo Mamone

March 20, 1975.